United States Court of Appeals
for the
District of Columbia Circuit

TRANSCRIPT OF RECORD

FOR MR. JUSTICE VAN ORSDEL

TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

JANUARY TERM, 1932

No. 5636

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E. GRIFFITHS HUGHES, INC., A CORPORATION,
APPELLANT,

vs.

FEDERAL TRADE COMMISSION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED MARCH 15, 1932.

PRINTED APRIL 28, 1932.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 8, 1932.

Court of Appeals of the District of Columbia

No. 5636.

E. Griffiths Hughes, Inc., a Corporation, Appellant,
vs.
Federal Trade Commission.

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a Supreme Court of the District of Columbia.

Equity. No. 53891.

E. Griffiths Hughes, Inc., a Corporation, Plaintiff,
vs.
Federal Trade Commission, Defendant.

United States of America,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition for Rule to Show Cause for Temporary and Permanent Injunction.*

Filed January 13, 1932.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 53891.

E. Griffiths Hughes, Inc., a Corporation, Plaintiff,
vs.
Federal Trade Commission, Defendant.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the District of Columbia:

Your petitioner, E. Griffiths Hughes, Inc., a corporation, respectfully represents:

1. The plaintiff, E. Griffiths Hughes, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the City of Rochester, State of New York.

2. The defendant, the Federal Trade Commission, hereinafter referred to as the Commission, is an administrative body created by Public #203, 63rd Congress, (38 Stat. 717), approved September 26th, 1914; that under the aforesaid Act of Congress the said Commission is authorized to prevent unfair methods of competition prohibited under Section 5, as in said Act provided.

3. The said Commission, purporting to be acting under the provisions of the aforesaid Act did, under date of August 13th, 1931, issue out of the said Commission its complaint known and designated as "In the matter of E. Griffiths Hughes, Inc., a corporation, docket #1966", a
copy of the said complaint being hereto annexed and
2 marked Exhibit "A" and is prayed to be taken and
read as a part hereof, as though fully set forth in the Bill of Complaint; that on or about the 26th day of October, 1931, the plaintiff (respondent before Commission) filed with the aforesaid Commission its answer, a copy of which said answer is annexed hereto and marked Exhibit "B", and is prayed to be taken and read as a part of the Bill of Complaint as though fully set forth herein.

4. That thereafter the issues raised by the complaint and answer were set for the taking of testimony before an Examiner appointed by the said Commission on the 12th day of January, 1932, at 10:00 o'clock in the forenoon.

5. That in pursuance to the notice for the taking of testimony before an Examiner, as aforesaid, this plaintiff (respondent before Commission) appeared.

6. At the time and place fixed in the notice for the taking of the testimony before the Examiner and before the administration of oath to any witness, and before and/or prior to the taking of any testimony, plaintiff (respondent before Commission) through its counsel, moved that the testimony about to be adduced by the Examiner be taken in the presence, exclusively, of the Examiner, counsel for and representatives, if any, of the Commission and counsel for and others, if any, representing the plaintiff (respondent before Commission) in a closed proceeding from which the

public should be excluded for the reasons then stated, and which are hereinafter fully set forth.

7. That the Examiner before whom the testimony was about to be adduced referred the said motion to the Chairman of the Commission.

3 8. That thereupon, counsel for plaintiff (respondent before Commission) appeared before the Chairman of the Commission and there renewed the motion that the testimony be taken in a closed proceeding and that the general public be excluded therefrom.

9. That the said Chairman of the Commission thereupon advised counsel for the plaintiff (respondent before Commission) that he would present the matter to the Commission, or to at least a quorum of the said Commission, for their determination, upon which statement by the Chairman counsel prayed for leave to appear before the Commission, or a quorum thereof, who were to pass upon the question and for further leave to renew and argue the said motion.

10. That thereafter, counsel for plaintiff (respondent before Commission), upon call of the Chairman of the Commission appeared again before the said Chairman, at which time counsel for the plaintiff (respondent before Commission) was advised that the Chairman had personally presented the motion of said counsel to the Commission and was thereupon advised that the motion of the counsel for the plaintiff (respondent before Commission) had been denied by the Commission, counsel for the plaintiff not having been present, however, at the session of the said Commission either prior to or during its consideration or deliberation on the motion.

11. That the plaintiff (respondent before Commission) is informed and believes and therefore alleges the fact to be that the taking of testimony in public in the said proceeding, in the course of the investigation being conducted by the Commission, before an Examiner of the Commission, is contrary to the intent of Congress and in violation of, and not warranted under the said Act of Congress creat-
4 ing the said Commission and enumerating its powers.

12. That heretofore and prior to the date hereof, there has appeared in the public press and trade journals, or a portion thereof, at least, announcement that the said Commission had issued its said complaint against the plain-

tiff (respondent before Commission), herein, as a result of the publication of which announcement, persons trading and doing a considerable volume of business with the plaintiff (respondent before Commission) have made inquiries of the plaintiff whether they may safely continue to trade with and continue their purchases of plaintiff's products in view of said proceedings instituted by said Commission against the plaintiff (respondent before Commission); and that since the appearance of the said announcement in the press and trade journals, the plaintiff (respondent before Commission) has to an appreciable extent suffered a loss of its business, and that the reason therefor, to the best of the plaintiff's knowledge, information and belief and upon which it therefore alleges the fact, is due solely and exclusively to the publication in the press and trade journals of the said announcement of the issuance of the complaint by the Commission against the plaintiff (respondent before Commission). And the plaintiff further alleges that while it, the plaintiff, will present testimony before the Commission which will fully and unequivocally refute and disprove the allegations of the complaint, nevertheless the making public or the release to the public of any testimony which may be adduced by the Commission, purporting to be in support of the allegations of its said complaint, prior to final determination of the issues now pending before the Commission on the merits will result in irreparable injury,
loss and damage to the business and property of this
5 plaintiff (respondent before Commission), for which
it has no full, complete or adequate remedy at law.

It is further alleged by the plaintiff to be the fact that the taking of said testimony in public, or permitting said testimony to become available to the public, prior to a final determination on the merits of this investigation by the Commission will serve to aggravate, increase and multiply the injury, loss and damage already occasioned to plaintiff (respondent before Commission), as aforesaid, and also for which the plaintiff has no adequate, or complete remedy at law.

13. That the act of making available by the Commission, to the public, the press, and/or trade publications, the fact that a complaint had been issued by the Commission against plaintiff which, as alleged, has already caused and will continue to cause irreparable loss and injury to plaintiff (re-

spondent before Commission), and the threatened intent and announced decision of the Commission to make available to the public, the testimony proposed to be adduced in this investigation prior to a final determination of the issues involved, which will cause further irreparable loss and injury to the plaintiff, are and will be acts in violation of the provision of the Fifth Amendment to the Constitution of the United States against depriving a citizen of its property without due process of law.

Wherefore, the premises considered, your petitioner respectfully prays:

1. That a writ of subpœna may issue out of this Honorable Court directed to the defendant and commanding it to appear and answer the exigencies of this Bill of Complaint.

2. That a rule to show cause be issued out of this Honorable Court, directed to the defendant, commanding it to appear and show cause, if any, it may have, why it
6 should not be restrained temporarily from further making public, directly or indirectly, the complaint dated the 13th day of August, 1931, issued by it and directed to the plaintiff.

3. That a rule to show cause be issued out of this Honorable Court, directed to the defendant, commanding it to appear and show cause, if any it may have, why it should not be restrained temporarily from taking in public any testimony in the matter of its complaint, dated the 13th day of August, 1931, directed against the plaintiff and/or making public, directly or indirectly, the transcript of such testimony.

4. That upon the final hearing of this case the said defendant, its servants, agents and/or employees, may be further enjoined perpetually from making public, directly or indirectly, the contents of its complaint against this defendant and/or making public, directly or indirectly, the transcript of the testimony adduced in this cause until such time as the issue by the complaint and answer joined are finally determined.

5. For such other and further relief as to the Court may seem just and proper.

E. GRIFFITHS HUGHES, INC.,
By F. W. CLEMENTS, *Pres.*

DISTRICT OF COLUMBIA, *ss:*

F. W. Clements, being first duly sworn, deposes and says that he is President of E. Griffiths Hughes, Inc., a corporation named as plaintiff in the above entitled cause; that he has read the foregoing petition by him subscribed and knows the contents thereof; that the matters and 7 things therein stated from personal knowledge are true and those stated on information and belief he believes to be true.

F. W. CLEMENTS.

Subscribed and sworn to before me this 12th day of January, 1932.

[NOTARIAL SEAL.] GEORGE E. MONK,
Notary Public, D. C.

ELWOOD H. SEAL,
DANIEL C. EBERLY,
CHESTER A. BENNETT,
Attorneys for Plaintiff.

8 EXHIBIT "A".

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

53891. Docket No. 1966.

In the Matter of E. GRIFFITHS HUGHES, INC., a Corporation.

Complaint.

Acting in the public interest, pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled, "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that E. Griffiths Hughes, Inc., a corporation, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act and states its charges as follows:

Paragraph One. That respondent, E. Griffiths Hughes, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York and has its principal place of business in the City of Rochester in the State of New York.

Paragraph Two. That said respondent is now and has been engaged for more than one year last past in the sale in interstate commerce of certain proprietary preparations known and designated as "Kruschen Salts" and "Radox Bath Salts" or "Radox". That said respondent in the usual conduct of its said business sells said products to wholesale and retail druggists located in the various states of the United States, other than the State of New York, for ultimate resale to members of the public, and said respondent causes and has caused its said products when so sold to be transported in interstate commerce from its said place of business in New York, to, into and through states of the United States other than New York, to said wholesale and retail dealers to whom said products are and have been sold.

Paragraph Three. That during the time above mentioned, other individuals, firms and corporations in the various states of the United States are and have been engaged in the sale of preparations similar in kind and as to purpose of use to those sold by respondent as stated above. That such other individuals, firms and corporations have caused and do now cause their said preparations when sold by them to be transported from various states of the United States to, into and through states other than the state of the origin of the shipment thereof. That said respondent has been, during the aforesaid time, in competition in interstate commerce in the sale of its said products with said other individuals, firms and corporations.

Paragraph Four. That the respondent herein, during the time above mentioned, in soliciting the sale of and in selling its said Kruschen Salts as aforesaid, makes use of and has made use of advertisements inserted in newspapers and
magazines circulated in and among the various states
9 of the United States to members of the public. That
in advertising said Kruschen Salts as aforesaid said respondent has caused to be inserted in said advertisements statements which represent or imply that said preparation is a cure or remedy for obesity and that it will reduce excess fat. Among the statements so used by respondent in referring to said Salts are the following:

"It's the little daily dose that does it."
"The Modern Way to Slenderize."

"Kruschen Salts has proved itself a thoroughly, dependable, quick, pleasant and what's best—a Safe and, Healthy method of reducing."

"Here's the recipe that banishes fat and brings into blossom all the natural attractiveness that every woman possesses. Every morning take one half teaspoonful of Kruschen Salts in a glass of hot water before breakfast. Be sure and do this every morning for 'It's the little daily dose that takes off the fat'."

"If you want to lose fat with speed get an 85¢ bottle of Kruschen Salts."

"A youthful slender figure means everything today and women have at last found an unusually effective, pleasant and actually healthy way to control their rebellious curves with Kruschen Salts."

"Kruschen method of weight reduction sensible and safe."

"Get on the scales today and see how much you weigh—then get an 85 cent bottle of Kruschen Salts (lasts 4 weeks), take one-half teaspoonful every morning in a glass of hot water and when you have finished the first bottle weight yourself again."

"The Modern Safe Way—Right Way to Lose Fat."

"A fashionable slender figure as well as glorious magnetic health can now be yours! Just take a half teaspoonful of Kruschen Salts in a glass of hot water every morning before breakfast."

and other statements of like import which represent or imply that said Kruschen Salts is a cure or remedy for obesity and will reduce excess fat, when in truth and in fact said salts do not constitute a cure or remedy for obesity and do not of themselves materially reduce excess fat but merely act as a purgative or laxative and diuretic.

Paragraph Five. That said Radox Bath Salts are packed in cartons or packages in which they are displayed for sale and sold to the consuming public. That the respondent herein, in soliciting the sale of and selling its said
10 bath salts as aforesaid, makes use of and and has made use of advertisements inserted in newspapers and magazines circulated in and among the various states of the United States to members of the public. That respondent has caused to be in-erted in such advertisements

and to be imprinted upon said cartons and upon leaflets or circulars enclosed therewith, various statements which represent or imply that said preparation, when used in the bath and as otherwise directed, releases and radiates great quantities of oxygen, and that such radiation of oxygen is of such extent that an invigorating and energizing effect is produced upon the body as well as other physiological and therapeutic effects; also, that the use of said preparation relieves pain and that it has medicinal or therapeutic value in various ways; that it is imported from England; and that it combines the properties of the world-famous medical spas and produces the effects of treatment at such places. Among such statements the following have appeared in said advertisements:

"Radox Bath Salts not only combines the same valuable properties of the world-famous Spas of Marienbad, Carlsbad and Vichy, but it also radiates great quantities of Oxygen in your bath water—and everyone knows what wonderful effects Oxygen has on the system! Never before have you ever felt so refreshed and soothed, your entire system is stimulated to a new life and activity."

"Right from England—"

The following statements appear on said carton or package:

"Radox Radiates Oxygen."

"A balanced preparation which impregnates the water of the bath or hand basin with valuable salts, and supercharges it with oxygen, forming an artificial mineral water combining the properties of the world-famous medicinal spa waters of Carlsbad, Vichy, Marienbad and Similar Baths."

"When you add Radox to your bath—Oxygen is liberated—enlivening and gloriously stimulating the entire body."

"It has an antiseptic action."

"Promotes the elimination through the pores of the skin of acid secretions from the blood, often the basic cause of: Many Skin Affections."

"Radox Bath Water is a * * * sedative in cases of skin affections."

"All soreness, inflammation, due to chilblains * * * soreness pains * * * are relieved quickly by a Radox Foot Bath."

The following statements appear on said leaflet or circular:

11 "Tired, fidgety nerves are quieted."
"Here from England."

"Radox (a balanced preparation of mineral salts), dissolved in the bath form an artificial mineral water supercharged with energizing oxygen, bringing within reach of all the cleansing, rejuvenating, energizing benefits of many of the World Famous Spa Waters of Europe and similar medicinal baths hitherto only enjoyed by the wealthy."

That, in truth and in fact, said salts, when used in the bath and as otherwise directed, do not release and radiate any material amount of oxygen and not sufficiently to have any material physiological or therapeutic effect upon the human body; that said salts, when used as aforesaid, do not have any material medicinal or therapeutic value, and statements and representations to that effect are greatly exaggerated, unwarranted, and misleading; that said salts are not imported from England but are prepared for respondent in this country; and that said salts do not combine the properties of the world-famous medical spas nor does their use at home produce the effects of treatment at such places.

Paragraph Six. That the representations of respondent as aforesaid in regard to said Kruschen Salts have had and do have the tendency and capacity to confuse, mislead and deceive members of the public into the belief that said Kruschen Salts are a cure or remedy for obesity and that their use will reduce excess fat.

Paragraph Seven. That the representations of respondent as aforesaid in regard to said Radox Bath Salts have had and do have the tendency and capacity to confuse, mislead and deceive members of the public into the belief that said Radox Bath Salts, when used in the bath and as otherwise directed, radiate oxygen in great quantities and sufficiently to produce an invigorating and energizing effect and to produce material physiological and therapeutic effects; that said salts, when used as aforesaid, have material medicinal and therapeutic value; that they are imported from England and that they combine the properties of the world-famous spas and that their use produces the effects of treatment at such places.

Paragraph Eight. That said misleading, erroneous and exaggerated representations of respondents in regard to both of said preparations, as above set forth, have had and do have the capacity and tendency to induce members of the public to purchase and use the same because of the erroneous beliefs engendered thereby, and to divert trade to respondent from competitors engaged in the sale in interstate commerce of products similar in kind and as to purposes of use to said products of respondent.

Paragraph Nine. That the above acts and things done by respondent are all to the prejudice and injury of the public and to the competitors of respondent in interstate commerce within the intent and meaning of Section 5 of an Act of Congress entitled, “An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes,” approved September 26, 1914.

12 Wherefore, the premises considered, the Federal Trade Commission on the 13th day of August, A. D., 1931, now here issues this its complaint against said respondent.

Notice.

Notice is hereby given you, E. Griffiths Hughes, Inc., respondent herein, that the 18th day of September, A. D. 1931, at 2 o'clock in the afternoon, is hereby fixed as the time and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place when and where a hearing will he had on the charges set forth in this complaint, at which time and place you shall have the right, under said Act to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

You are notified and required on or before said date, to file with the Commission an answer to the complaint. If answer is filed appearance on that date will not be required and the hearing on the charges will be postponed to a later date, due notice of which will be given. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule III) provide as follows:

(1) In case of desire to contest the proceeding the respondent shall, within such time as the Commission shall allow (not less than 30 days from the service of the complaint) file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of

the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegation of the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Commission.

(2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding, the answer may consist of a statement that respondent refrains from contesting the proceeding or that respondent consents that the Commission may make, enter, and serve upon respondent an order to cease and desist from the violations of the law alleged in the complaint, or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint, to waive a hearing thereon, and to authorize the Commission, without a trial, without evidence, and without findings as to the facts or other intervening procedure, to make, enter, issue and serve upon respondent an order to cease and desist from the method or methods of competition charged in the complaint.

13 (3) Failure of the respondent to appear or to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In witness whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary, and its official seal to be hereto affixed at Washington, D. C., this 13th day of August, A. D. 1931.

By the Commission.

[SEAL.] OTIS B. JOHNSON,
Secretary.

14 EXHIBIT "B."

Answer.

UNITED STATES OF AMERICA:

Before Federal Trade Commission.

53891. Docket No. 1966.

In the Matter of E. GRIFFITHS HUGHES, INC., a Corporation.

The answer of E. Griffiths Hughes, Inc., the above-named respondent, to the complaint of the Federal Trade Commission, the complainant, shows and alleges as follows:

Answering the introductory paragraph of said complaint, respondent denies that the complainant is acting in the public interest as therein alleged and denies the charges therein alleging that the respondent has been or is using unfair methods of competition in interstate commerce in violation of the statute therein mentioned.

First. The respondent admits the allegations of paragraph "One" of said complaint.

Second. The respondent admits the allegations of paragraph "Two" of said complaint.

Third. Answering paragraph "Three" of said complaint, respondent denies that during the times mentioned
15 either individuals, firms or corporations in the various States of the United States are, or have been, engaged in the sale, and/or shipment in interstate commerce, of preparations similar in kind and as to purpose and use as those sold by respondent, and respondent further denies that it has been, during the times mentioned, or is now, in competition in interstate commerce in the sale of its products with other firms and corporations.

Fourth. Answering paragraph "Four" of said complaint, respondent admits that during the times mentioned therein it has made use of advertisements in newspapers and magazines circulated in and among the various States of the United States to members of the public in soliciting the sale of, and in selling, its said Kruschen Salts. Respondent denies that in said advertising it has caused to be inserted in said advertisements statements with respect to Kruschen

Salts which represent or imply that the said preparation is a cure or remedy for obesity, but admits that it has made statements in said advertisements that Kruschen Salts will reduce excess fat and alleges that statement to be the truth and the fact. Respondent further admits that among the statements so used by it in referring to Kruschen Salts are the statements specifically quoted and set forth in paragraph "Four" of said complaint. Respondent denies that such statements, or any other statements of like import, represent or imply that the said Kruschen Salts is a remedy or cure for obesity, but it admits that the said statements, and other statements of like import, represent or imply that Kruschen Salts will reduce excess fat, and alleges that the said preparation taken as directed will in truth and in fact reduce excess fat. Respondent further denies that
16 the said salts do not of themselves materially reduce
excess fat and denies that the said salts merely act as a purgative, laxative and diuretic, and the respondent alleges the truth and fact to be that the said salts do reduce excess fat.

Fifth. Answering paragraph "Five" of said complaint, respondent denies that the Federal Trade Commission has any jurisdiction over the packaging in cartons, or otherwise, of its product Radox Bath Salts, or any right, power, or authority to pass upon the same, or any jurisdiction over the same, or any jurisdiction over the respondent by reason thereof, and alleges that the said complainant in attempting to exercise power or authority over such matters is exceeding its authority and jurisdiction as conferred upon it by the Act of Congress approved September 26, 1914, entitled "An Act to Create a Federal Trade Commission, to Define its Powers and Duties and for other purposes" and by reason thereof the respondent does not admit any of the allegations of said paragraph or of said complaint with respect to said matters.

Further answering said paragraph "Five" of said complaint, the respondent admits that in soliciting the sale of and in selling its bath salts known as Radox Bath Salts, it has made use of advertisements inserted in newspapers and magazines circulated in and among the various States of the United States to members of the public and has caused to be inserted in said advertisements statements which represent or imply that said preparation when used in the bath

and as directed, releases and radiates a large quantity of oxygen and that said release of oxygen is of such an extent that an invigorating and energizing effect is produced upon the body, but denies that it has made any repre-
17 sentations in its said advertising that said bath
salts have therapeutic effects or have physiological effects (other than that the said bath salts have a cleansing and refreshing effect upon the human body), or that the said preparation relieves pain, or that it has medicinal or therapeutic value or that it is imported from England. The respondent admits, however, that among the statements heretofore made by the respondent in its advertising, there appeared the statements specifically set forth in paragraph "Five" of said complaint so far as said paragraph refers to advertising matter.

The respondent further avers and alleges with regard to the statement heretofore appearing in some of its advertising, viz., "right from England," that said statement referred to the formula used in the preparation of the said Radox Bath Salts and to the name thereof, and respondent alleges that, in truth and in fact, not only did the formula and name come from England, but also that upon the introduction of the product to the American market, and for some time afterward, the said product was manufactured in its entirety from materials imported from England, and that at the present time some of the contents of the preparation are still imported from England and used in the manufacture thereof.

Respondent further alleges that both said advertising statements complained of and set forth in the complaint appeared but once or twice, have long since, and for a long time and upward of one year prior to the service of the complaint herein, been discontinued, nor has respondent since then used, nor is it now using, said statements, or others of like import, in its advertising.

With respect to the statements alleged in the complaint to appear upon the carton or package of Radox Bath
18 Salts, or on the label or leaflet or circular accompany-
ing the same, respondent alleges that the Federal Trade Commission, the complainant herein, has no jurisdiction over, or any power, authority or duty with respect thereto, and that if jurisdiction lies in any governmental department, bureau or other branch or division over any

statements contained on the said carton, package, or label, or leaflet or circular, in relation to said Radox Baths Salts, such jurisdiction would be solely and exclusively under the Food and Drugs Administration of the Department of Agriculture, and respondent therefore refuses to admit such jurisdiction on the part of the complainant or the truth of the allegations set forth with respect to the carton, package, label, leaflet or circular pertaining to the said Radox Bath Salts.

The respondent denies that the said Radox Bath Salts, if used in the bath as directed, do not release and radiate any material amount of oxygen and not sufficiently to have any material physiological effect upon the human body and alleges that in truth and in fact, said bath salts do release a material amount of oxygen and in sufficient quantities to have a cleansing and energizing effect upon the human body; respondent denies that the said salts when used as directed do not have a medicinal or therapeutic value, but the respondent alleges that in none of its advertisements has it made any representation that the said bath salts have medicinal or therapeutic values. Respondent denies that any statements or representations which it has made are exaggerated or are unwarranted or are misleading. It denies that the said salts are not imported, in part at least, from England, and alleges the truth and the fact to be that, as aforesaid, at one time all the constitutents of the
19 preparation were so imported and that presently some of the material entering into said preparation is so imported. Respondent denies that the product is prepared for the respondent by others, but alleges that it is prepared by the respondent itself in this country. The respondent denies that the said salts do not combine properties of some of the world famous bath spas or that their use at home does not produce the effect of the bath treatments at such places, and alleges the truth and the fact to be that the salts do combine certain properties of certain spa baths and that their use at home produces the cleansing and energizing effects of bath treatments at such waters.

Sixth. Answering paragraph "Six" of the complaint, respondent denies that the representations of the respondent as set forth in the complaint with regard to said Kruschen Salts have had at any time a tendency and capacity to confuse, mislead or deceive members of the public into the belief that said Kruschen Salts are a cure or remedy for obesity, and alleges that no such representations have been or are made by the respondent. The respondent, however, admits that it represents that Kruschen Salts will reduce excess fat and alleges that to be the truth and the fact.

Seventh. Answering paragraph "Seven" of the complaint, respondent denies that its representations with regard to Radox Bath Salts have had or do have a tendency to confuse, mislead or deceive members of the public into the belief that said Radox Bath Salts when used in the bath and as otherwise directed radiate oxygen in great
20 quantities and sufficiently to produce an invigorating and energizing effect, the respondent alleging that such bath salts in truth and in fact do radiate oxygen in considerable quantities and sufficiently to produce an invigorating and energizing effect. Respondent denies that it represents that the said bath salts produce material physiological effects other than a cleansing and refreshing effect or that said salts have a therapeutic effect, or that the said salts when used as directed have material medicinal and therapeutic value or that they are imported from England. Respondent denies that its representations have the tendency and capacity to confuse, mislead or deceive the public into the belief that said bath salts contain properties of the world famous bath spas and that their use produces the effect of bath treatments at such places, and alleges the truth and fact to be that the *the* public is not deceived, misled or confused, and that the said bath salts do in truth and in fact contain valuable properties of some of the world famous bath spas and their use produces the effect of bath treatments thereby.

Eighth. Answering paragraph "Eight" of the complaint, respondent denies that it has made any misleading, erroneous or exaggerated representations in regard to both its said preparations, or either of them, as set forth in the complaint, or otherwise, and denies that any representations that it has made have the capacity and tendency to induce members of the public to purchase same because of any erroneous beliefs engendered thereby and denies that it has made any misleading, exaggerated or erroneous representations by reason of which trade has been diverted to it from competitors engaged in the sale in interstate com-

merce of products similar in kind to said products of
21 the respondent, and denies that there are any such persons or products, and denies that any of its representations are misleading, exaggerated or erroneous. Respondent alleges that all its representations have been in accordance with the truth and the fact.

Ninth. Answering paragraph "Nine" of the complaint, respondent denies that the acts and things done by respondent complained of in the complaint are all, or any of them, to the prejudice or injury of the public or to competitors of respondent in interstate commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, and denies that it has any such competitors, and denies that the Federal Trade Commission, the complainant herein, has jurisdiction in the premises.

As a first, separate and distinct defense to the complaint herein:

Tenth. Respondent alleges that the said complaint fails to state facts sufficient to show that the respondent has used, or is using, unfair methods of competition in commerce within the meaning of the statute aforesaid, or sufficient to give the said Federal Trade Commission, the complainant herein, the power and authority to act in, or jurisdiction over, the matters set forth in the complaint, and that any order to "cease and desist" issued by the said complainant herein would be in violation of the constitutional rights of the respondent herein as provided for in Articles I and V of the Articles in Addition to and in Amendment of
22 the Constitution of the United States, and will deprive the respondent of freedom of speech, and of life, liberty and property without due process of law.

Wherefore E. Griffiths Hughes, Inc., the respondent herein, prays that the said complaint be dismissed.

E. GRIFFITHS HUGHES, INC.,
By F. W. CLEMENTS,
President, 26 *Forbes Street, Rochester, N. Y.*

ALBERT EDWARD MAVES,
1 *Cedar Street, New York City;*
ELWOOD H. SEAL,
Tower Building, Washington, D. C.,
Attorneys for Respondent.

23 *Defendant's Return to Rule, Answer to Complaint, and Motion to Dismiss Complaint.*

Filed January 19, 1932.

* * * * * * *

To the Honorable the Justices of the Supreme Court of the District of Columbia:

Comes now defendant, Federal Trade Commission, and for its return to the rule to show cause issued herein, for its answer to the complaint herein, and for its motion to dismiss the bill of complaint herein, says:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10. Defendant admits the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of such complaint, respectively.

11. The defendant denies all the allegations of paragraph 11 of the bill of complaint herein, and the defendant says the allegations of paragraph 11 of said complaint do not constitute allegations of fact, but are mere allegations of information and belief as to a matter of law, or of a conclusion of law as to the tenor and legal effect of the certain act of Congress by which defendant, Federal Trade Commission, was created and its powers and duties defined.
24 Plaintiff's said information and belief as to the law, and plaintiff's said conclusion of law as to the tenor and effect of said statute, are erroneous and unwarranted by the provisions of said statute or by any law or laws.

As a further defense of law the defendant says that the taking of testimony in public in the said proceedings described in the bill is according to the intent of Congress, is not in violaton of, and is warranted under, the said Act of Congress creating the said Commission and enumerating its powers.

Section 5 of said Act expressly provides that "the testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission."

Since the creation of defendant, defendant has established and maintained the uniform practice of admitting the public to all hearings before the Commission or its examiners on complaints issued under said Section 5. On March 31, 1920, declaratory of said uniform practice, defendant made, adopted and entered upon its records a rule in the following words, to-wit:

"Ordered, that all hearings before the Commission or its examiners on formal complaints are hereby declared to be public hearings."

Said rule is in full force and effect.

12. Answering paragraph 12 of the bill the defendant says that it has no information as to the truth or falsity of the allegations therein made and leaves the plaintiff to its proof thereof, if the same be material, proper or competent; but defendant says that proof thereof is not and will not be material, proper, or competent.

It is the law that the publication of a truthful statement in the press and trade journals of the fact of the issuance of said complaint by the Commission, or of its contents and tenor, cannot result in irreparable or other injury to plaintiff in a legal sense, and cannot entitle plaintiff to equitable relief.

25 The allegation in said paragraph 12 that plaintiff will present testimony before the Commission which will fully and unequivocally refute and disprove the allegations of the Commission's said complaint, tenders an issue that cannot arise or be considered or decided in this case, and can be given no effect as a part of the complaint herein. The fact so alleged can be presented, considered and decided in the first instance only by the Federal Trade Commission, and the decision thereof by said Commission can be reviewed, affirmed, modified or set aside only by a proper United States Circuit Court of Appeals in a proceeding instituted under said Section 5. Said statute expressly withholds jurisdiction of said question from all other courts.

The allegations of irreparable injury contained in said paragraph 12 of the complaint herein are not allegations of fact, but are allegations of the pleader's mere conclusions. They tender no issue of law or fact and can be given no effect as parts of the complaint herein.

It is the law that the taking of evidence open to the public upon the trial of the issues formed upon said complaint so issued by the Commission cannot in a legal sense result in irreparable or other injury to plaintiff herein, and cannot entitle plaintiff to the equitable relief sought herein.

It being the duty of the Commission to conduct such trial in public, if the complaint were to allege irreparable injury thereby, as it clearly does not, such allegation could not be given any legal effect as a part of the complaint herein, not be made the basis of equitable relief herein, for the same reason that this court would not enjoin a public trial of the issues formed upon any other proceeding, civil, or criminal, instituted and prosecuted by the Government of the United States.

The allegation in paragraph 12 that plaintiff has no adequate or complete remedy at law is nugatory and can be given no effect as a part of the complaint herein for the following reasons:

26 (a) The allegation is not an allegation of fact. It is a mere conclusion of law unwarranted by any allegations of fact.

(b) The complaint does not allege any facts which show that plaintiff is suffering any legal wrong or is entitled to any remedy at law or in equity.

13. Answering the allegations of irreparable injury contained in paragraph 13 of the complaint herein, defendant says that such allegations are but a reiteration of allegations contained in the 12th paragraph of the complaint herein. They are not allegations of fact. They constitute mere conclusions of the pleader unwarranted by any facts alleged in said complaint. They can be given no legal effect as parts of the complaint herein for the reasons set forth in paragraph 12 of this answer.

The allegation in said paragraph 13 that defendant's proceedings upon said complaint so issued by defendant Commission "will be acts in violation of the provision of the Fifth Amendment to the Constitution of the United States against depriving a citizen of its property without due process of law," is nugatory, and can be given no legal effect as a part of the complaint herein, for each of the following reasons, respectively, which are presented as defenses of law herein, to-wit:

A. It does not constitute an allegation of fact.

B. It is an allegation of the pleader's mere conclusion and, therefore, tenders no issue of law or fact, being unwarranted by any fact or facts alleged in said complaint.

C. There is no allegation of fact in the complaint herein from which it appears or may be inferred that the action of defendant upon said complaint or in said proceedings based thereon has resulted or probably will result in depriving plaintiff in a legal sense of any property or right, or subject plaintiff in a legal sense to injury in relation thereto.

27 D. The allegations of the complaint herein affirmatively show that defendant, in the issuance of said complaint and in all proceedings based thereon, has at all times proceeded in strict compliance with law and has at all times given and proposed to continue to give, to plaintiff the full benefit of all provisions of law, withholding from plaintiff in no sense or degree any element of due process of law in the premises.

E. The complaint herein does not allege facts sufficient to constitute a cause of action.

F. The complaint herein does not allege facts sufficient to entitle plaintiff to equitable relief.

G. The complaint herein does not allege facts sufficient to entitle plaintiff to any relief.

H. The complaint herein is in legal effect a petition to this Court to consider, decide and reverse the action of defendant, Federal Trade Commission, upon a question that is merely preliminary, interlocutory, and procedural, and which this Court is not authorized by law to consider, review, decide or reverse. Such power could be vested in this Court only by statute and no statute vests such power in this Court.

I. The complaint herein is in legal effect a petition to this Court to review and reverse an order made by defendant, Federal Trade Commission, denying the certain motion made by plaintiff before said Commission in the progress of the trial alleged in the complaint herein. Said Section 5 of said statute vests the right to review, modify or set aside certain orders made by Federal Trade Commission exclusively in the United States Circuit Courts of Appeals, and denies to all other courts the power to set aside orders of such Commission.

Wherefore defendant, Federal Trade Commission, respectfully prays the Court to make and enter its decree herein granting to defendant relief as follows:

28 (1) Discharging the rule to show cause heretofore issued herein against defendant.

(2) Denying the petition of plaintiff for the issuance of a restraining order herein.

(3) Dismissing the complaint herein.

ROBT. E. HEALY,
Chief Counsel Federal Trade Commission;
MARTIN A. MORRISON,
Assistant Chief Counsel;
HARRY D. MICHAEL,
Attorneys for Defendant.

29 UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Otis B. Johnson, being first duly sworn, on my oath say:

That I am Secretary for Federal Trade Commission, defendant in the case in which the above and foregoing answer is to be filed to the complaint therein, and that I make this affidavit as such secretary and for the use and benefit of said defendant;

That I have read and am familiar with the allegations contained in said answer and am familiar with the facts to which such allegations relate;

That the allegations of fact contained in said answer are true in substance and in fact.

OTIS B. JOHNSON, [SEAL.]
Secretary Federal Trade Commission.

Subscribed and sworn to this 18th day of January, 1932, before me, the undersigned, a Notary Public in and for the District of Columbia, by the above named.

EDNA B. VINCEL, [SEAL.]
Notary Public.

My commission expires June 9, 1934.

Received a copy of the within answer this 19th day of January, 1932, at 9:30 A. M.

ELWOOD H. SEAL.

30 *Final Decree.*

Filed February 11, 1932.

* * * * * * *

This cause came on to be heard at this term upon bill and answer, and was argued by counsel; and thereupon, upon consideration thereof, It is ordered, adjudged and decreed that the bill of complaint filed herein be and the same is hereby dismissed, this 11th day of February, 1932.

DANIEL W. O'DONOGHUE,
Justice.

Approved as to form.
ELWOOD H. SEAL,
Attorney for Plaintiff.

Appeal noted in open court this 11th day of February, 1932, and appeal bond fixed at $100 or in lieu thereof a deposit of $50 cash with the Clerk of Court.

DANIEL W. O'DONOGHUE,
Justice.

Memorandum.

February 15, 1932.—$50 deposited by Douglas, Obear & Douglas for costs on appeal.

31 *Assignment of Errors.*

Filed February 17, 1932.

* * * * * * *

The Court erred:

1. In refusing to issue an injunction restraining the defendant from taking in public any testimony in the matter of its complaint against the plaintiff, pending final determination of the issues joined by the complaint and answer.
2. In refusing to issue an injunction restraining the defendant from making public any testimony taken in the matter of its complaint against the plaintiff, pending final determination of the issues joined by the complaint and answer.
3. In holding that the defendant might take in public testimony on the issues joined by the defendant's complaint and the plaintiff's answer.
4. In dismissing the plaintiff's bill of complaint.
5. In holding that the plaintiff was not entitled to equitable relief.

ELWOOD H. SEAL,
Attorney for Plaintiff.

ELWOOD H. SEAL,
Attorney for Plaintiff.

32 *Designation of Record.*

Filed February 17, 1932.

* * * * * * *

Now comes the plaintiff, by its attorney, and requests the Clerk to include in the transcript of record on appeal to the Court of Appeals noted in this case, the following designated parts of the record:

1. Plaintiff's petition for rule to show cause, for temporary and permanent injunction, together with exhibits "A" and "B" thereto attached.
2. Defendant's return to rule, answer to complaint, and motion to dismiss complaint.
3. Final Decree dismissing bill.
4. Date of noting appeal.
5. Date of deposit of cash in lieu of bond.
6. Assignment of Errors.
7. This designation.

ELWOOD H. SEAL,
Attorney for Plaintiff.

I hereby certify that I duly delivered a copy of above designation of record to Harry D. Michael, attorney for defendant, this 17th day of February, 1932.

ELWOOD H. SEAL,
Attorney for Plaintiff.

ELWOOD H. SEAL,
Attorney for Plaintiff.

33 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 32, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 53891 in Equity, wherein E. Griffiths Hughes, Inc., a corporation, is Plaintiff and Federal Trade Commission is Defendant, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 15th day of March, 1932.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5636. E. Griffiths Hughes, Inc., a corporation, appellant, vs. Federal Trade Commission. Court of Appeals, District of Columbia. Filed Mar. 15, 1932. Henry W. Hodges, Clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAY 2 6 1932

Henry W. Hodges
CLERK

IN THE

Court of Appeals, District of Columbia

April Term, 1932.

No. 5636.

E. Griffiths Hughes, Inc., a corporation, *Appellant*,
vs.
Federal Trade Commission, *Appellee*.

BRIEF ON BEHALF OF APPELLANT.

Albert E. Maves,
Elwood H. Seal,
Attorneys for Appellant.

Press of Byron S. Adams, Washington, D. C.

IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1932.

No. 5636.

E. GRIFFITHS HUGHES, INC., a corporation, *Appellant*,

vs.

FEDERAL TRADE COMMISSION, *Appellee.*

BRIEF ON BEHALF OF APPELLANT.

Statement of Facts.

On August 13th, 1931, the Federal Trade Commission, appellee herein, purporting to be acting under the provisions of an Act of Congress, known as Public No. 203, 63rd Congress, approved September 26th, 1914, issued out of its office a complaint, directed against the appellant charging it *inter alia* with false and fraudulent advertising and unfair methods in trade in interstate commerce. (R. pp. 6-12.)

Thereafter, the appellant on or about the 26th day of October, 1931, filed its answer to the complaint categorically denying the charges as alleged. (R. pp. 13-18.)

Upon the filing of the answer, the Commission set the 12th day of January, 1932, as the time for the taking of testimony before an Examiner in furtherance of its investigation and to establish, if it could, the charges as alleged, which said charges formed the basis of its complaint dated the 13th day of August, 1931, as aforesaid.

On the said 12th day of January, 1932, counsel for the appellant appeared before an Examiner at the Commission's offices, in Washington, D. C., and before any witness was called or sworn moved the Examiner that the testimony about to be adduced be taken in the presence, exclusively, of the Examiner, counsel for and representatives, if any, of the Commission and counsel for and others, if any, representing the appellant, in a closed proceeding from which the public should be excluded. The motion was denied by the Examiner and later by the Commission to which the motion was carried.

On the day following the denial by the Commission of the aforesaid motion, the appellant filed its Bill of Complaint in the Court below, praying that the Commission be enjoined perpetually from making public, directly or indirectly, the contents of the complaint issued against the appellant and/or making public, directly, or indirectly, the transcript of the testimony adduced in furtherance of its investigation *until such time as the issues by the complaint and answer joined were finally determined by the Commission.* (R. pp. 1-12.)

Thereafter the appellee filed its answer (R. pp. 19-23) and the cause, after hearing on bill and answer, was on the 11th day of February, 1932, dismissed (R. pp. 23-24). From the action of the Court below dismissing the Bill of Complaint the appellant appeals.

QUESTIONS INVOLVED.

Does the Federal Trade Commission, prior to a final determination of the issues involved, possess the right or power under the Act of Congress known as Public No. 203, 63rd Congress, approved September 26th, 1914, (38 Stat. 717)

(a) To make public or cause to be made public, directly or indirectly, the contents of its complaint against appellant.
(b) To take testimony before an Examiner in an open or public session in furtherance of its inquisitorial powers and in an effort to establish the guilt of appellant.
(c) To make public or cause to be made public, directly or indirectly, the transcript of testimony taken in furtherance of its inquisitorial powers and in its effort to establish the guilt of appellant.

ARGUMENT.

I.

Federal Trade Commission Must Show Express Powers.

To begin with, it is necessary for the appellee to show a statutory grant of power for any act which is attempted by it. There is no provision in the Act of Congress itself creating the Commission, nor in any amendment thereto, that expressly or by necessary implication, authorizes or empowers the Commission publicly to take testimony in the furtherance of its investigation to ascertain the guilt or innocence of a respondent. In the Court below the Commission failed, and it is confidently asserted must necessarily fail in this Court, to show that it has any such powers. The burden of showing its grant of power is upon the Commission. It must show from the Act creating it, in express terms or by necessary implication, that it has the right to order the taking of testimony in this, or any other case before it, in an open and public session. It is not necessary that this appellant show that such authority is denied. The burden of showing that it has the authority is upon the Commission. It must show where in the act such authority is given to it. Nor can the Commission adopt rules which will permit it to do something that Congress has failed to authorize it to do in its act of creation.

If Congress had intended that the investigations of this Commission should be open to the public, it would have expressly so provided. Congress found it necessary to provide in the Interstate Commerce Act (U. S. Code, Title 49, Chapter 1, Sec. 171, as follows:

> "Any party may appear before the Commission or any division thereof and be heard in person or by attorney. Every vote and official act of the Commission, or of any division thereof, shall be entered of record, *and its proceedings shall be public upon the request of any party interested.*" (Italics supplied.)

And again in the Revenue Act creating the U. S. Board of Tax Appeals (U. S. Code, Title 26, Chapter 22, Sec. 1219 (a), Congress said:

> "Notice and opportunity to be heard * * * shall be given to the taxpayer and the Commis-

> sioner, * * *. *Hearings before the Board and its divisions shall be open to the public,* * * *." (Italics supplied.)

And in the Act known as "Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927, U. S. Code, Title 33, Chapter 18, Par. 923 (b), 44 Stat. 1437 Congress resorted to the following language:

> "Hearings before a deputy commissioner *shall be open to the public* and shall be stenographically reported, and the deputy commissioners, subject to the approval of the commission, are authorized to contract for the reporting of such hearings. The commission shall by regulation provide for the preparation of a record of the hearings and other proceedings before the deputy commissioners." (Italics supplied.)

Congress found it necessary to give to the Bureau of Corporations, which was supplanted by the Federal Trade Commission, power to make public, at the direction of the President, information obtained or so much thereof as the President might direct. The language was set forth in (38 Stat. L. 718) as follows:

> "* * * and the information so obtained, or so much thereof as the President may direct shall be made public."

If the power publicly to investigate is not contained in the enumerated powers delegated to it by Congress, then the Commission cannot assume powers not granted to it. It cannot enlarge upon its powers nor go beyond the Act which created it. In one of the most recent cases before the Supreme Court of the United

States, this fundamental principle of law was reaffirmed when the Court in Federal Trade Commission v. Raladam, 283 U. S. 643; 649, said:

> "*Official powers cannot be extended beyond the terms and necessary implications of the grant.* If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions." (Italics supplied.)

II.

Federal Trade Commission Not a Court.

The Commission cannot contend that the taking of its testimony in furtherance of its investigation is analogous to the taking of testimony in court. The Federal Trade Commission is not a court, nor does it possess any of the attributes of a court. That this proposition is true is too definitely established to permit argument to the contrary.

In Eastman Kodak Company v. Federal Trade Commission, 7 Fed. 2nd, 994, 996, the Court said:

> "The Commission is not a court; it exercises administrative, not judicial, power (National Harness, etc., Association v. Federal Trade Commission) 268 Fed. 705; Chamber of Commerce vs. Federal Trade Commission, 280 Fed. 45, * * *"

This case was affirmed by the Supreme Court of the United States in 274 U. S. 619, 71 L. Ed. 1238, 1240, that Court using this language:

> "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers."

The Commission is not a Court, it is nothing more than a fact-finding body, purely administrative, possessing only such limited powers as are conferred upon it by the act creating it.

III.

Powers of the Commission.

The powers of the Commission when viewed in connection with a matter such as is before this Court are twofold.

(First). To investigate the truth or falsity of the charge.

(Second). After its investigation is completed to issue a cease and desist order if the charges have been sustained; if not sustained to dismiss the complaint.

IV.

To Permit Testimony to be Taken in Public Causes Irreparable Injury.

Not only did Congress fail to provide the Commission with such destructive powers as it attempts to arrogate unto itself, but it did not intend that this fact-finding, inquisitorial body, should be permitted, through the medium of publicity, to destroy and wreck reputable businesses by broadcasting infamous charges, regardless of the truth or falsity thereof, and thereafter publicly to take testimony in furtherance of its charges and in an effort to sustain that which even the Commission itself has yet to decide. To put such power in the hands of this body, is to wreck business, destroy confidence in government and to abrogate constitutional rights.

To permit the Commission to make its charges publicly, and thereafter publicly to take testimony in furtherance thereof, cannot help but cause irreparable injury. The charge may thereafter be dismissed but the injury has been sustained. No amount of publicity can ever compensate for the damage already done. Did Congress give to this Commission these powers? It is confidently asserted that Congress did not give to this Commission the power, nor did it even for one moment entertain such an idea.

The whole tenor of the Federal Trade Commission Act, considering its objects and purposes, would seem to indicate that Congress intended the Commission to proceed carefully, quietly, cautiously in its investigation until it shall have made its final findings of fact, for in performing its jury functions it might well disbelieve the evidence of the government or think it insufficient. How else can the public interest be served or the requirements of fairness as laid down in decided cases, be met? The procedure by which the Commission has heretofore accomplished its extra legal infliction of punishment to respondents to the ruin of their business is well described by Mr. Justice Denison in the case of *Raladam v. Federal Trade Commission,* 42 Fed. (2d) 430, in the following language (p. 436-37):

> "* * * This particular case relates to medicine advertising, and of a class doubtless disapproved by the 'best people'—who can afford to employ good doctors; but that disapproval cannot create jurisdiction. The record here shows, without dispute, or by implication which would hardly be denied, that the American Medical Association is engaged in a campaign against those proprietary remedies which it believes ought to be used by the public either not at all or only under supervision.

It has a Bureau for that and other purposes, and the Bureau employs a director. When it is thought that a particular advertisement should be stopped, this director takes the matter up with the Commission and with the Association of 'Better Business Bureaus', which are scattered over the country. Thereupon the Commission, if it approves, files a complaint, and eventually, if it is convinced of the truth of its complaint, makes the order to desist and refrain. The Better Business Bureaus explain to their local newspapers and to the general periodicals that it would be wise to refuse this advertising. The Chairman of the Commission, in public addresses, and in correspondence, advises the newspapers that they will be subject to prosecution by the Commission as defendants, to be joined with the advertisers, if they do not desist from such publications; and the newspapers may suspect that, if they do not comply with the advice of the Better Business Bureaus their general advertising patronage from the membership of these bureaus will fall off. It appears that these methods of influence, carried on in this case before this cross-suit for enforcement was commenced, and while it has been pending, have destroyed a large part of petitioner's business through refusals to accept this advertising, and only the injunction of this court is needed to make the elimination complete. We have no occasion to deny nor, indeed, reason to doubt, that this elimination would tend to the public good; but we cannot think that Congress had any conception that it was creating a tribunal for that kind of action. Its failure for many sessions to pass a proposed 'pure fabric' law, and others of similar character, is familiar; but if the Commission's view of its own jurisdiction is right, these laws are unnecessary."

Upon consideration therefore of the arguments above advanced it is respectfully submitted that the

Commission exceeds its power when it attempts to hold public hearings in this case, for the reason that such procedure would not comply with the rule of fairness laid down by the court, and for the further reason that the avowed purpose—public interest—will not best be served.

V.

Property Rights Involved.

The question here involves property rights of the appellant. The Constitutional demands fairness in the procedure of the Commission. As was said in *Chamber of Commerce v. Federal Trade Commission*, 13 Fed. (2d) 673 the Circuit Court of Appeals for the 8th Circuit, in discussing whether a rule promulgated for a court should be held applicable to procedure before the Commission said (p. 683):

> "* * * While hearings before administrative bodies need not have all of the formality of judicial procedure but may be informal and, if suited to the matter involved, rather summary (Davidson vs. New Orleans, 96 U. S. 104, 107, 24 L. Ed. 616; Hager v. Reclamation Dist. 111 U. S. 701, 708, 709, 4 S. Ct. 663, 28 L. Ed. 569; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 118, 17 S. Ct. 56, 41 L. Ed. 369), yet *there are certain elements of fair play required by the Constitution* which are necessary in any character of hearing affecting personal or property rights." (Italics supplied.)

It should be noted that the court here states that, as in the instant case, where property rights are involved the Constitution demands fairness in the procedure of the Commission.

To permit this purely fact-finding, inquisitorial body to broadcast its charges and publicly to take testimony in substantiation thereof is in deprivation of the appellant's constitutional rights in that the effect is to deprive the appellant of its property without due process of law. Before the issue is decided the appellant's business is damaged, his property rights invaded, and no remedy either in law or equity attains.

VI.

Commission Keeps Secret Stipulations Admitting Guilt.

It is the established practice of the Commission to keep secret all facts and proceedings where the party charged agrees to a stipulation admitting the allegations of the Commission's complaint. But, as in the instant case, where the respondent before that body denies the charges and defends itself, they subject him to publicity in the press of the nation which may well ruin the business of the respondent. The Commission thus adopts procedure which can be used as a club to force its victim to admit charges which may or may not be true. There is little choice—the victim, if innocent, might just as well admit that certain of his trade practices are illegal as have his business ruined in trying to protest his innocence—for what profit it a man to deny his guilt, if his very denial shall subject him to punishment.

VII.

Proceedings Before the Commission Brought Under Section 5 of the Act.

The Commission under Section five of the Act is delegated the power to proceed against any person, partnership or corporation which it shall have reason to believe is using unfair methods of competition in trade, it appearing to the Commission that the public interests would thereby be served.

Section 6, on the other hand, embodies various powers of the Commission to investigate in certain prescribed situations. This division of the powers of the Commission into two broad classes has been recognized by the courts. Chief Justice McCoy in *Royal Baking Company v. Federal Trade Commission* (decided June 21, 1927, by the Supreme Court of the District of Columbia, Law No. 72, 173) said:

> "Section 5 of the Act gives the Commission broad powers of investigation and various other powers, and has conferred on it various duties, none of which has any relation to its powers and duties under Section 5."

And again in *Federal Trade Commission v. Miller's National Federation* (1931) 47 Fed. (2d) 428, 429, Mr. Justice Van Orsdel speaking for our own Court of Appeals, made the following statement:

> "The power of investigation conferred upon the Commission by Section 6 is different in character from the jurisdiction conferred by Section 5. Section 6 contemplates an investigation for the collection of facts for the information of Congress in aid of the exercise of its legislative functions, or for the President in aid of recommending necessary legislation."

The Commission seeks to exercise its power through public hearings, and since the affirmative action is its, the burden rests upon it to establish through the Act its authority. Throughout the entire Act reference is made to "hearings" by the Commission without qualifying words to designate whether they shall be public or private. Section 6, Paragraph F of the Act comes closest to explaining the legislative intent with reference to the nature of the hearing to be had by the Commission. It provides as follows:

> "That the Commission shall also have power: To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; * * *"

It, therefore, becomes material to the decision in this case to decide what is the scope and meaning of this sub-section of the Act.

It is respectfully submitted that this section should be so interpreted that injustice might not result to parties respondent before the Commission. This conclusion would seem to follow from the very nature of the body itself. It is an inquisitorial, administrative body and not a court. It is further respectfully submitted that the word "information" in the above quotation should only mean the facts ultimately found by the Commission and should not include testimony taken prior to that time. It is also suggested that the word "hereunder" in the above quotation should be restricted to mean and refer to Section 6 of the Act only.

This would seem to be the necessary conclusion, in view of the extracts from the opinions above quoted, in which it is pointed out that the purposes of Sections 5 and 6 are different and unrelated. Since, therefore, Paragraph F relating to publication of information comes as a sub-head in Section 6, it should not be construed to refer also to Section 5 because of the general principle that *expressio unius est exclusio alterius.* This construction is further substantiated by the use of the word "hereunder" which by the same token and by the same reasoning should restrict Paragraph F to Section 6.

Another paragraph of Section 6 would also tend toward the construction advanced by appellant. Paragraph C gives the Commission power to investigate compliance with anti-trust decrees which have previously been issued against a corporation. The Commission is given authority to ascertain in what manner the decree is being complied with and, "it shall transmit to the Attorney General a report embodying its findings and recommendations as the result of any such investigation, and the report shall be made public in the discretion of the Commission." Congress, in this instance, made express provisions for publication. It therefore follows that the legislature evidently considered the question of publication and thought it necessary to investigations under Paragraph C of Section 6. When, therefore, it omitted this provision from Section 5, it must be taken that the legislature did not intend the hearings thereunder to be made public.

Therefore, it is respectfully submitted that the Federal Trade Commission cannot establish its authority for the holding of public hearings either by express provision of the Act or as a necessary implication therefrom. The plainest principles of statutory construction would indicate that no such power is given and that the public interest does not demand that the hearings of the Commission should be attended with publicity which will cause great and irreparable damage to innocent parties before that body.

CONCLUSION.

The Act does not specifically give the power to hold a public hearing, nor is it a necessary incident to its power, nor can it be found upon a proper interpretation of the Act. It has been shown that in the analogous cases of the Board of Tax Appeals, the Interstate Commerce Commission and in other similar bodies, the legislature deemed it necessary specifically to provide for public hearings. It has also been shown that the Federal Trade Commission is not a court, but that it is purely an administrative, inquisitorial, fact-finding body. It has likewise been shown that the courts have required fairness of the procedure of the Commission and that the public interest will not be served by having public hearings. All of these having been shown, it is respectfully submitted that the decree appealed from should be reversed.

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FOR MR. JUSTICE ROBB

COURT OF APPEAL
DISTRICT OF COLUM
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Henry W. Hodge

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No. 5636

In the Court of Appeals of the District of Columbia

APRIL TERM, 1932

E. GRIFFITHS HUGHES, INC., A CORPORATION,
APPELLANT
v.
FEDERAL TRADE COMMISSION, APPELLEE

BRIEF ON BEHALF OF APPELLEE

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IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

April Term, 1932

No. 5636

E. GRIFFITHS HUGHES, INC., A CORPORATION,
Appellant,

v.

FEDERAL TRADE COMMISSION,
Appellee.

APPELLEE'S CITATION OF ADDITIONAL AUTHORITY.

Appellee respectfully asks permission of the Court to cite an additional authority to be considered as cited at page 13 of Appellee's printed brief herein, to-wit:

The absence of express provision in Section 5 for public hearings does not indicate a legislative intent to withhold a power which it is the settled policy of the Congress to vest in administrative bodies exercising quasi-judicial powers. The view of the Supreme Court of the United States is directly to the contrary.

Goldsmith v. Board of Tax Appeals,
270 U. S. 117, 122.

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In the Court of Appeals of the District of Columbia

April Term, 1932

No. 5636

E. Griffiths Hughes, Inc., a Corporation,
appellant
v.
Federal Trade Commission, appellee

BRIEF ON BEHALF OF APPELLEE

STATEMENT OF CASE

This proceeding is based upon a complaint (hereinafter called "Bill," to avoid confusion with the "Complaint" of the Federal Trade Commission) filed in the Supreme Court of the District of Columbia by E. Griffiths Hughes, Inc., appellant, against Federal Trade Commission, appellee, asking a decree temporarily enjoining the Commission:

1. From making public a certain complaint dated the 13th day of August, 1931, issued by the Commission against the appellant.
2. From taking in public any testimony upon the issues joined upon said complaint.
3. From making public the transcript of such testimony.

Appellant's bill also asked that, upon final hearing, the Commission, its servants, agents and/or employees, be perpetually enjoined from making public the contents of said complaint, and/or the transcript of said testimony, until such time as the issue by said complaint and the answer thereto joined are finally determined.

The bill carried as exhibits copies of said complaint so issued by the Commission and of appellant's answer thereto.

Bill seeking injunction—Tr. pp. 1 to 6.

Copy of Commission's complaint—Tr. pp. 6 to 12.

Copy of appellant's answer to Commission's complaint—Tr. pp. 13 to 18.

To said bill for injunction and the rule issued thereon to show cause, appellee filed as one pleading its return to said rule, its answer to the bill, and its motion to dismiss said bill. (Tr. pp. 19 to 23.)

The cause came on to be heard "upon bill and answer," and was argued by counsel; and thereupon, upon consideration thereof, the court ordered, adjudged, and decreed that said bill be dismissed. (Tr. p. 23, line 3 f. b. to line 4, p. 24.)

The action of the Supreme Court of the District of Columbia so taken upon said bill and answer is assigned in this court as error. (Tr. p. 24.) In the meantime, E. Griffiths Hughes, Inc., applied to this court for a restraining order pending appeal, which application this court denied.

THE FACTS

The case having been heard "upon bill and answer," the allegations of the bill so far as they are not denied, and the allegations of the answer, are to be taken by the court as true. (*In re Sanford Fork & Tool Co.,* 160 U. S. 247, 257; *United States* v. *Freight Association,* 166 U. S. 290, 341.)

Such facts constitute "the facts" in this case.

Paragraphs 1 to 10 of bill

Appellee's answer admits the allegations of the first ten paragraphs of appellant's bill for injunction. (Tr. p. 19, lines 4 to 12.)

These facts, so far as essential, may be summarized briefly.

The bill alleges the issuance of a complaint by the Commission against appellant under Section 5 of the Federal Trade Commission Act, charging the use of methods alleged to constitute unfair methods of competition within the meaning of said Section 5; the service of a copy thereof on appellant and the filing of appellant's answer thereto, the making public of said complaint; the fixing of a time and place to take testimony on the issues so formed in said case; the purpose of the counsel for the Commission in said case to take such testimony at a place open to the public; requests and motions by appellant to take such testimony at a place not open to the public; and the denial of such requests and motions by the Commission.

Paragraph 11 of bill

Appellee's answer denies the allegations of paragraph 11 of appellant's bill. (Tr. p. 19 line 13 to line 4 p. 20.)

The allegations of said paragraph 11 are not, therefore, to be taken as true. Were such allegations not denied, they would not be taken as true, since they are not allegations of fact. They are mere erroneous conclusions of law; and can be given no effect for any purpose. (Tr. p. 3 lines 5 to 12 f. b.; *Bennett* v. *Ahrens,* 57 Fed. (2d) 948, 950; *Livestock National Bank* v. *United States,* 36 Fed. (2d) 334, 336–7.)

Appellee's answer to said paragraph also sets out affirmatively the fact that the Commission, immediately after its creation by the Federal Trade Commission Act, established, and has ever since uniformly maintained, the practice of holding all hearings upon complaints issued under said Section 5 in places open to the public; also that on March 31, 1920, declaratory of said uniform practice, appellee made, adopted and entered upon its records a rule in the following words, to-wit:

"Ordered, that all hearings before the Commission or its examiners on formal complaints are hereby declared to be public hearings"; and that said rule is in full force and effect.

These, as all other allegations of the answer, are to be taken as true.

Paragraph 12 of bill

Appellee's answer does not admit the allegations of paragraph 12 of the bill, and the same can not be taken as true. (Tr. p. 20 line 5 to line 16 p. 21.)

Paragraph 12 purports to allege that appellant will suffer irreparable injury, unless appellee is enjoined from taking such testimony in a place open to the public, but it alleges only erroneous conclusions of law. It alleges no fact that can be taken as true.

Appellee's answer to paragraph 12 further alleges facts to show that appellant has suffered, and is about to suffer, no wrong nor any loss in a legal sense and, therefore, is entitled to no remedy.

These allegations are to be taken as true, and are necessarily true as a matter of law on the facts alleged in the first ten paragraphs of appellant's bill.

Paragraph 13 of bill

The allegations of paragraph 13 of the bill are not admitted by appellee's answer. (Tr. p. 21 line 17 to line 29, p. 23.)

They are not allegations of fact that can be taken as true. They purport to allege irreparable injury and a violation of the Fifth Amendment to the Constitution of the United States. They constitute only erroneous conclusions of law. In the light of the facts alleged in the first ten paragraphs of the bill, which must be taken as true, such allegations are untrue as a matter of law. The only allegations of the bill that can be taken as true are those alleged in the first ten paragraphs thereof. All allegations of appellee's answer are to be taken as true.

THE QUESTION BEFORE THE COURT

The Act of Congress creating the Federal Trade Commission and defining its powers and duties (Public—No. 203—63rd Congress) provides for the issuance of a complaint in cases of the use of unfair methods of competition in commerce "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public" (Sec. 5). Said section further provides for a hearing and for reducing the testimony to writing and filing the same in the office of the Commission. The matters involved in the petition considered in this appeal have to do with such complaint, hearings, transcript of the testimony and proceedings connected therewith. (Tr. pp. 1–3.)

There is no complaint on the part of appellant that, in the conduct of the proceedings involved, the Commission is conducting the same in any other manner than that in which all its proceedings are conducted or that the respondent therein is being deprived of any rights or privileges granted to other respondents or subjected to any rules or impositions not enforced against or imposed upon others in like circumstances. *The question before the Court, therefore, is whether* *in the particulars involved the Commission is conducting its business according to its said creative Act and whether its rules and established practices in regard thereto are in accordance with law and within its powers. To that question we direct the attention of the Court.*

(For convenient reference, the relevant portions of the Federal Trade Commission Act—Sections 5 and 6 (f) and (g), are printed as a part of the Appendix to this brief.)

THE LAW

I. Section 5 of the Federal Trade Commission Act must be interpreted as providing for making the complaint public, for holding public hearings, and making the testimony a public record

(1) The complaint is to be issued only in the "interest of the public." (Section 5 of Federal Trade Commission Act; *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 27.)

(2) "The formal complaint is brought in the Commission's name; the prosecution is wholly that of the Government; and it bears the entire expense of the prosecution." (*Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25.)

(3) "Any person, partnership or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person." (Section 5, *supra.*)

The proceeding is by the Government in the interest of the public and may be participated in by "any person, partnership or corporation." It simply can not be commenced and carried on in secret. Such action would nullify the provision quoted last above. A statute is to be so construed as to give effect to every provision thereof. (*United States* v. *Lexington,* 232 U. S. 399, 410; *Ex Parte Public Bank,* 278 U. S. 101, 104.)

II. Established practice determines construction of statute

Were the statute open to construction, it has been construed by the uniform practice of the Commission since the approval of the Federal Trade Commission Act.

"Since the creation of defendant, defendant has established and maintained the uniform practice of admitting the public to all hearings before the Commission or its examiners on complaints issued under said Section 5." (A period of 18 years.) (Tr. p. 19, lines 4 to 7 f. b.)

Uniform construction of an Act by an administrative department of the Government over a long period of years is entitled to great weight as evidence that such construction is in harmony with the intention of Congress. If it were not, in the 18 years since the Federal Trade Commission Act was approved, Congress would have made clear its contrary intention. (*Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 235.)

"Nothing is more convincing in interpretation of a doubtful or ambiguous statute." (*Wisconsin* v. *Illinois,* 278 U. S. 367, 413.)

"Such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required." (*United States* v. *Jackson,* 280 U. S. 183, 193.)

Uniform construction continued for nine years was "considered as decisive." (*Luckenbach S. S. Co.* v. *United States,* 280 U. S. 173, 182.)

In December, 1929, the Supreme Court of the United States held that regulations uniformly enforced under "The Revenue Act of 1918 and subsequent Acts" would not be disturbed. (*Brewster* v. *Gage,* 280 U. S. 327, 336.)

See also the decision of the Circuit Court of Appeals for the Second Circuit in *The Semaramis,* 50 F. (2d) 623.

III. The Federal Trade Commission given power to adopt rules and regulations

Moreover, the statute expressly gives to the Commission power "to make rules and regulations for the purpose of carrying out the provisions of this Act." (Federal Trade Commission Act, Sec. 6g.) Pursuant to said power, the Commission on March 31, 1920, adopted and entered upon its records the following rule:

> Ordered, that all hearings before the Commission or its examiners on formal complaints are hereby declared to be public hearings. (R. p. 20.)

Said rule has been consistently followed, is now in effect and the practice so provided for was followed uniformly at all times prior to its adoption. (R. pp. 19–20.)

In addition the Commission has adopted and published in its "Rules of Practice and Procedure and Statements of Policy," as shown at p. 15 of said rules, the last issue of which is dated July 1, 1932, the following:

> After a complaint has been issued and served, the papers in the case shall be open to the public for inspection, under such rules and regulations as the secretary may prescribe.

Such statement is merely declaratory of the uniform practice of the Commission and the same has been reiterated in various issues of said " Rules of Practice."

It is our contention that such rules, policies and practices do not constitute any assumption of power beyond that granted by said Act, but that they are merely matters of procedure in carrying out the powers expressly given and are within the above quoted authority to adopt rules and regulations for such purposes. If Congress had intended that hearings on formal complaints should be held in secret or in " star chamber " sessions, it would have so provided.

IV. An administrative body may be authorized to adopt rules and regulations

It is beyond question that Congress may authorize an administrative body to adopt rules and regulations for the conduct of its business and for the purpose of carrying out the purposes of the Act creating it. The nature and effect of such delegations of power is well expressed in the case of *United States* v. *Frank, et al.,* 189 Fed. 195, 200–1, in which the court said:

> The authority to make all needful regulations not inconsistent with law is not a delegation of power to add something to an incomplete law nor a grant of judicial power. It is only an authority to determine the fact upon which the operation of the law is made to depend.

Other cases upholding the authority to adopt rules and regulations are:

> *United States* v. *Grimaud,* 220 U. S. 506;
> *Haas* v. *United States,* 17 Fed. (2d) 894, 896;
> *District of Columbia* v. *Bailey,* 18 Fed. (2d) 367;
> *Caha* v. *United States,* 152 U. S. 211;
> *Tindle* v. *Heiner,* etc., 17 Fed. (2d) 522, 523.

It will be noticed that the cases cited uphold administrative rules and regulations, the violation of which may result in the imposition of penalties. In the instant case, the rules and regulations involved are merely in regard to procedural matters and the methods of conduct of the Commission's business. In the last case cited above the court said:

> the Supreme Court has held that it is settled by the decisions of that court that a regula-

tion by a department of government, addressed to and reasonably adapted to the enforcement of an Act of Congress, the administration of which is confined to such department, has the force and effect of law, if it be not in conflict with express statutory provision.

V. The courts take judicial notice of the rules and regulations of administrative bodies

It is well settled that courts take judicial notice of the rules and regulations established by an administrative officer or tribunal. (*Caha* v. *United States,* 152 U. S. 211, 222; *Thornton* v. *United States,* 271 U. S. 414, 420; *Daniels* v. *United States,* 17 Fed. (2d) 339, 343.)

These rules were formally and expressly adopted as such, and have the force and effect of law. They are, however, declaratory of the Commission's prior uniform practice.

VI. No set form required for rules and regulations

It has also been held that: "regulations need not be promulgated in any set form, nor in writing." (*Haas* v. *Henkel,* 216 U. S. 462, 480–1.)

VII. The Federal Trade Commission is an administrative tribunal exercising administrative powers quasi judicially

Appellee does not contend that it is a court or exercises judicial powers. It is an administrative tribunal exercising administrative powers quasi judicially. The statute expressly provides that its proceedings under Section 5 shall be quasi judicial, i. e., "as if" or "after the manner of" judicial proceedings, to wit, upon formal complaint, service, answer, trial, testimony, transcript of testimony filed in the office of the Commission, briefs, argument, formal findings of fact, and final order. The statute provides for a judicial method of exercising administrative powers, and this method is further elaborated in the Commission's Rules of Practice and Procedure.

At pages 4 and 5 of its brief, appellant has demonstrated that it is the established general policy of the Government that hearings before administrative officers and tribunals shall be public.

That there is no direct and express provision in Section 5 for public hearings (its other express provisions make public hearings necessary) does not indicate a purpose to depart from such general policy. "It is not lightly to be assumed that Congress intended to depart from a long-established policy." (*Robertson* v. *Railroad Labor Board,* 268 U. S. 619, 627.)

The Commission's administrative powers are therefore to be exercised "as if" or "after the manner of" judicial powers, as this Court formerly exercised administrative powers upon appeals from the Commissioner of Patents. (*Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693, 698–9.)

As showing the recognition accorded by the Courts to the quasijudicial nature of the Commission's proceedings under Section 5 of its organic act, reference is made to the following cases:

> *Royal Baking Powder Co.* v. *Federal Trade Commission,* 281 Fed. 744–5.
>
> *Millers' National Federation* v. *Federal Trade Commission* (Sup. Ct. D. C., Sept. 22, 1926.) Reported in F. T. C. Statutes and Dec. p. 554.
>
> *Federal Trade Commission* v. *Millers' National Federation et al.*, 47 F. (2d) 428.
>
> *Arizona Grocery Co.* v. *A. T. & S. F. Ry. Co. et al.,* 52 Sup. Ct. 183.

In the first case above cited the court said: "The Act invests the commission with certain quasi-legislative and quasi-judicial power." In the second case cited the court said (Sup. Ct. D. C.): "The Federal Trade Commission Act constitutes the Commission a quasi-judicial tribunal for some purposes and a purely administrative agency for others." *In the decision covered by the third citation above, this Court said: "Section 5 of the Federal Trade Commission Act confers upon the Commission quasi-judicial authority to institute a proceeding against any person, partnership, or corporation that it has reason to believe has been or is using any unfair method of competition in commerce."* The above last citation involves the powers of the Interstate Commerce Commission in regard to which the court said: "In passing upon the issue of fact, the function of the Commission was judicial in character." Likewise the Federal Trade Commission in passing on the issues of fact raised by its complaints promulgated under Section 5 exercises functions that are judicial in character.

VIII. Court hearings are public

It is well settled that court proceedings shall be held in public. In criminal proceedings this is a statutory right, while in civil cases the conduct of "open and notorious" hearings is based on the established "policy of the law." There are certain statutory exceptions in some jurisdictions and certain judicial discretion is recognized in exceptional cases, but the time-honored general practice remains unchanged. With certain exceptions, it is held in England that the court has no power to hold a trial in private.

> 26 Ruling Case Law, pp. 1014–1015. *Crabtree* v. *Hazenbaugh,* 23 Ill. 349, 76 Am. Dec. 694. 38 Cyc. 1298.

IX. The courts will not interfere with proceedings before the Federal Trade Commission

The Federal Trade Commission Act, by its terms, confers upon the Circuit Courts of Appeals of the United States jurisdiction to enforce and to modify, set aside, or affirm orders to cease and desist issued by the Federal Trade Commission. Such jurisdiction is made exclusive by the terms of the Act except as to review by the Supreme

Court of the United States upon certiorari. Said Act provides for no other jurisdiction and confers none upon the Supreme Court of the District of Columbia. In conformity with such provisions, it has repeatedly been held that the courts will not interfere with proceedings before the Commission.

> *Federal Trade Commission* v. *Nulomoline Co.,* 254 F. 988.
>
> *T. C. Hurst & Son* v. *Federal Trade Commission,* 268 F. 874, 878.
>
> *Royal Baking Powder Co.* v. *Federal Trade Commission,* 32 F. (2d) 966–968.
>
> *Douglas Fir Exploitation and Export Co.* v. *Federal Trade Commission,* Sup. Ct. D. C. In Equity, No. 39839, April 3, 1922, Mr. Justice Bailey, F. T. C. Statutes and Decisions, pp. 197, 198.
>
> *Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45, 48–9.
>
> *Royal Baking Powder Co.* v. *Federal Trade Commission,* Sup. Ct. D. C., At Law, No. 75648, May 17, 1929, F. T. C. Statutes and Decisions, pp. 703–4.
>
> *Macfadden Publications, Inc.,* v. *Federal Trade Commission et al.,* Sup. Ct. D. C., at Law No. 76601, May 17, 1929, F. T. C. Statutes and Decisions, pp. 704–5, Affirmed Ct. of Ap. D. C., 37 Fed. (2d) 822.
>
> *Royal Baking Powder Co.* v. *Federal Trade Commission,* Sup. Ct. D. C., In Equity No. 47284, Nov. 7, 1927, F. T. C. Statutes and Decisions, pp. 650, 651, 653.
>
> *Butterick Co. et al.* v. *Federal Trade Commission,* Sup. Ct. D. C., Aug. 12, 1921,

F. T. C. Statutes and Decisions, p. 378, note 1.

The above cases arose out of a wide variety of circumstances, but in all cases it has been consistently held that the right of review afforded by the Act is exclusive and the courts will not assume jurisdiction in other circumstances. As stated by Justice Van Orsdel of this court in *Royal Baking Powder Co.* v. *F. T. C.,* 32 F. (2d) 966, 968, cited above:

> It is well settled that the right of review herein afforded by the Circuit Court of Appeals constitutes a "plain, speedy, and adequate remedy at law" and is a bar to the remedy by injunction.

In the last case cited above the petition was dismissed in the Supreme Court of the District without opinion. The petition sought to enjoin the Commission from prosecuting a complaint. An appeal to this court was prayed and taken, but was dismissed because not perfected in time.

X. The courts will not review preliminary or procedural questions in proceedings before administrative tribunals

The above proposition of law is well settled, as shown by the following cases:

United States v. *Illinois Central R. R. Co.,* 244 U. S. 82, 89.

N. Y. O. & W. Ry. Co. v. *United States,* 14 Fed. (2d) 850.

Brooklyn Eastern District Terminal v. *U. S. et al.,* 28 Fed. (2d) 634.

Royal Baking Powder Co. v. *Federal Trade Commission,* F. T. C. Statutes and Decisions, pp. 650–3, supra.

In the instant case there is no final order of the Commission. This proceeding is in effect to review the action of the Commission in denying a motion made by appellant that testimony be taken in a closed proceeding (Record p. 3), which said action amounts to a direction that hearings in the case and the records thereof be public as in other cases and in accordance with established practice and the rules of the Commision.

In the last case cited above the Supreme Court of the District of Columbia said in regard to the Federal Trade Commission—

> that its order reopening the case, as well its subsequent orders in relation thereto, were administrative and procedural in character; and that the same are not subject to review by this Court.

XI. Orders of the Federal Trade Commission are public records

Just as there is no specific provision in the Federal Trade Commission Act providing for public hearings and records pertaining to complaints, so there is no such specific provision providing that the record of an order to cease and desist shall be a public record. All that is provided for in this regard is for the publication of "reports and decisions," as previously pointed out. Yet there is one decided case which supports appellee's interpretation of Section 5. This exact question as to the right of the public to be informed of proceedings under Section 5 has been decided in *Artloom Corporation* v. *National Better Business Bureau, Inc., et al.,* 48 Fed. (2d) 897. In that case the plaintiff sought to enjoin the publication of the Commission's order to cease and desist. The court held that the rule as to the right of the public to be informed of judicial proceedings applies equally to "administrative and legislative" proceedings. The Court said:

> The order of the Federal Trade Commission directing the plaintiff to cease and desist advertising one of its rugs as a Wilton is a public record, made after a hearing before an administrative board to determine whether the plaintiff was using an unfair method of competition in commerce. Before commencement of proceedings the Commission must be of opinion that an investigation "would be to the interest of the public." Act Sept. 26, 1914, Sec. 5 (15 U. S. C. A., Sec. 45). If Congress had intended that the existence of such an order be kept confidential until its propriety should be questioned in court, it could and would have so provided. * * * The qualified privilege to publish such proceedings extends to administrative and legislative matters as well as to proceedings in court.

The reasoning and conclusions above stated by the court apply equally to complaints, hearings, transcripts of testimony, and other proceedings after the issuance of complaint and prior to the issuance of an order.

It could just as well be reasoned that an order should not be a public record because injury *might* result to the respondent concerned by reason of the publication thereof and the revelation of the matters involved, when it all may be set aside and held for naught on review by the Circuit Court of Appeals as provided for in the Act. In the instant case appellant (respondent before Commission) contends that it has a meritorious defense to the complaint issued by the Commission and that the Commission may not issue an order to cease and desist. No more injury could result in such a case by publication of proceedings prior to issuance of an order than would result on publication of the order (if one should issue), even though such order should subsequently be set aside by the Circuit Court of Appeals.

Every indictment becomes public as soon as the defendant is placed under arrest. Every complaint in a civil action, together with all subsequent proceedings, becomes public as soon as the complaint is filed in the office of the clerk of the court.

Appellant is seeking to compel secrecy in the Commission's case "until such time as the issue by the complaint and answer joined *are finally determined.*" (Italics supplied.) That necessarily includes secrecy as to the order, which must be directed against the method charged in the complaint, and its publication, therefore, would make public the contents of the complaint.

An order issued by the Commission does not finally determine "the issue by the complaint and answer joined." In the language of Mr. Justice Brandeis: "Standing alone it is only informative and advisory." It may be "acquiesced in by the respondents," but the Commission can not enforce it. (*Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 432.)

The order determines no issue. Only a court can determine—

(1) Whether the findings are supported by testimony.

(2) Whether the evidence proves material facts not found by the Commission.

(3) Whether the method alleged, proven, and found is unfair within the meaning of Section 5.

The issue in the *Artloom case* was in principle identical with the issue which appellant has attempted to raise in the instant case, and the decision in that case would be controlling here, were the rightful powers of the Commission not otherwise conclusively established in the ways hereinabove specifically set forth.

At page 13 of its brief appellant asserts that the powers granted to the Commission by Section 6 (f) of the Federal Trade Commission Act are limited to investigations conducted under Section 6 of said Act. As already shown, that proceedings under Section 5 must be a public record and open to the public from and after the issuance and service of the complaint, is required by the provisions of Section 5 itself.

Appellant is, however, in error in its contention that the powers granted by Section 6 (f) are limited to investigations under Section 6.

Congress would not have authorized publication of information compiled primarily for the use of Congress under Section 6, and enjoined secrecy as to proceedings under Section 5, to which every member of "the public" may rightfully become a party, and which are intended for the protection and guidance of the entire public, including all persons engaged in commerce and all purchasers and prospective purchasers. Besides that fact, as already shown, Section 5 by necessary implication compels publicity of all proceedings had thereunder.

XII. The general purport of the Federal Trade Commission Act shows intent that hearings shall be public, as well as the records connected therewith

There is no provision in the Federal Trade Commission Act that hearings on formal complaints brought under Section 5 shall be in camera, nor that the records connected with such hearings shall not be open to the public. Neither is there specific provision to the contrary, unless said Section 6 (f) be so construed. However, a reasonable interpretation of the Act clearly shows the intent of Congress that such hearings should be public and that the records thereof shall be open to public inspection. No other interpretation would make effective the provisions of the Act.

As stated in a previous paragraph of this brief, the Commission is authorized to issue a formal complaint only after it has decided that it would be to the interest of the public to do so. It is inconceivable that Congress intended that such complaint, issued after such finding and the preliminary investigation necessarily involved, should not be made public. Nor is it conceivable that Congress intended that the hearings provided thereon should not be public. The very fact that the Act provides for reducing the testimony to writing and filing the same in the office of the Commission (F. T. C. Act, Sec. 5, par. 3) clearly indicates that such transcript shall be a public record. Such provision would necessarily negative secret hearings and make them of no effect.

Moreover, it will be noted that it is provided in said last-cited paragraph of the Federal Trade Commission Act that—

> Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission, to intervene and appear in said proceeding by counsel or in person.

Said provision would be entirely ineffective if the complaint in any case brought under said Section 5 were not made a matter of public record.

Neither would it be possible for anyone to intervene after the start of the taking of testimony for reasons that might develop as the result of such testimony if the hearings were not conducted in public and the transcript of the testimony were not made a public record. The rules of the Commission above referred to, providing for public hearings on formal complaints and making the papers in the case open to the public for inspection, make effective this provision for intervention.

Appellant's brief, at page 13, cites Sec. 6 (f) of the Federal Trade Commission Act and advances the contention that said subdivision applies only to powers of the Commission covered by Section 6, and that it does not apply to proceedings brought under Section 5 as here involved. However, if such contention is sound, is it reasonable to suppose that Congress intended to limit the power of the Commission to that of making public only information obtained as the result of its investigations? Such investigations might involve unfair methods of competition covered by Section 5, and the Commission would be in the anomalous position of being able to make public the results of preliminary investigation thereof and being prevented from making public later proceedings when the same matter had advanced to the stage of the issuance of a formal complaint. Such a situation would be an absurdity.

Furthermore, said Sec. 6 (f) applies to proceedings under Section 5.

Section 6 (f), including the latter part therof (in italics) not quoted in appellant's brief, reads as follows:

> (f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; *and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.*

The " decisions " referred to can only apply to decisions rendered under Section 5 or by other authority of Congress, for no decisions are involved in the matters covered by said Section 6. Consequently, appellant's argument that said subsection (f) can apply only to matters under Section 6 can not stand.

XIII. Appellant's bill below does not state such injury as will entitle it to injunctive relief

The bill under consideration seeks a decree of injunction. To be sufficient in law, it must allege that, in the absence of the injunction asked for, plaintiff will suffer some irreparable injury. (*United Fuel Gas Co.* v. *R. R. Comm.*, 278 U. S. 300, 310.)

The courts have held that because a party may be injured in his or its credit in the eyes of the public as the result of a governmental proceeding is not ground for injunctive relief. (*Brooklyn Eastern District Terminal* v. *United States et al.*, 28 Fed. (2d) 634, 636; *United States* v. *Los Angeles and Salt Lake R. R. Co.*, 273 U. S. 299.)

Such loss, if any, as appellant may sustain by reason of the filing of the complaint against it by the Federal Trade Commission and the subsequent proceedings thereunder is merely the incidental result of the exercise of a governmental function which is incidental to the exercise of all governmental functions. It has been held in regard to formal complaints brought by the Commission that "the prosecution is wholly that of the Government." (*Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25.)

Therefore, any loss resulting can not constitute, in a legal sense, irreparable injury or any injury at all, calling for a remedy, legal or equitable. At most it would be *damnum absque injuria*.

Moreover, the complaint below alleged irreparable injury as a mere conclusion. A mere general allegation is not sufficient, as *facts* must be set out from which the court may determine therefrom whether or not irreparable injury will result. (14 Ruling Case Law, p. 332; *Shelton* v. *Platt*, 139 U. S. 591, 596; *Cruikshank* v. *Bidwell*, 176 U. S. 73, 81;

Universal, etc., v. *General, etc.,* 31 Fed. (2d) 969, 970.)

The law in this regard is well summarized in Ruling Case Law, cited above, as follows:

> The general rule of equity pleading that a statement of mere conclusions or opinions of the pleader is not sufficient to authorize equitable interposition applies in a case of a bill for an injunction. The rule that the facts must be alleged is frequently called into action in those cases where an injunction is sought on the ground of irreparable injury to the complainant. In these cases the bill of complaint should allege facts to enable the court to determine whether the injury will be irreparable. A mere general allegation that it will be of such a character is not sufficient.

If the Commission should finally issue a cease-and-desist order against this company, and if the Court of Appeals, on review, should sustain it, there certainly could not be said to be any irreparable injury to the respondent by reason of the fact that the complaint had been made public.

XIV. Applicant's action in making the Commission's complaint a part of its pleadings in this case necessarily renders futile any injunctive relief which may be afforded

One element of alleged injury is in making public the complaint issued against appellant by the Commission. Appellant filed with its bill, in the

Supreme Court of the District of Columbia a copy of the Commission's complaint, thereby making it a matter of public record available to newspaper men and the general public. Such copy is also made a public record in the record filed by appellant in this court.

It would have been a futile thing for the court below to enjoin appellee from making public a document appellant had already made a matter of public record in that court. A court of equity will not do a "useless or vain thing." (*Minnesota, etc.,* v. *United States,* 47 Fed. (2d) 942, 943.)

The remaining element of alleged injury is in making public the testimony in the case or a transcript thereof. The bill makes no allegation as to the identity of the proposed witness or witnesses, as to the subject matter or tenor and effect of the proposed testimony or evidence. It alleges no fact from which injury may be even remotely inferred.

The bill is so fatally insufficient in law that it does not present to the court the question as to the rightful power of the Commission to make the complaint, trial, and record available to the public.

XV. Appellant's reference to the Raladam case has no conceivable bearing on the issues in the instant case

At pages 8 and 9 of its brief, appellant has incorporated a long quotation from the decision of the Circuit Court of Appeals in the Raladam case (42 Fed. (2d) 430, 436–7). The quotation has no conceivable bearing on the issues in the instant case. The case did relate to false and misleading representations as to an alleged remedy for obesity, which is likewise the charge in the instant case, appellant's product being an alleged obesity cure. The Circuit Court of Appeals held in that case that the Commission had no power to determine the fact of the falsity of such representations, although the court did not doubt that the elimination of such alleged remedy would "tend to the public good."

The case was taken on certiorari to the United States Supreme Court. That court held that the dangerous quality of said remedy was an issuable and findable fact (not a mere opinion, as held by the lower court), reversing that portion of the opinion of the lower court which is incorporated in appellant's brief. The United States Supreme Court used the following language:

> Findings, supported by evidence, warrant the conclusion that the preparation is one which can not be used generally with safety to physical health except under medical direction and advice. If the necessity of protecting the public against misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not be successfully assailed. (*Federal Trade Commission* v. *Raladam Company,* 283 U. S. 643, 646.)

The power of the Commission to find as a fact the alleged falsity of appellant's representations is not before this court and can not arise in this case. If it were, the language of the Supreme Court of the United States as above quoted is conclusive in favor of such power. Appellant has quoted only that portion of an irrelevant decision which the Supreme Court of the United States expressly reversed.

CONCLUSION

The court below was correct in its interpretation of the law when it dismissed the bill of complaint herein: 1st, because the Commission was acting within its expressly granted powers in adopting rules and practices providing for public hearings and public records in regard thereto; 2nd, because a consideration of the whole Federal Trade Commission Act plainly shows the intent of Congress that hearings and records as here involved should be public; 3rd, because the Commission exercises certain quasi-judicial functions and its proceedings are analogous to court proceedings and therefore public policy would require public proceedings; 4th, because, by interpretation of the Act, orders of the Commission are public records without specific authority in the Act; 5th, because courts will not interfere with proceedings before the Federal Trade Commission except in the manner provided by law; 6th, because the courts will not interfere with preliminary or procedural matters before administrative bodies; 7th, because the bill of complaint does not set out specifically such injury as will entitle appellant to injunctive relief; and 8th, because the proceeding before the Commission is that of the government and injury that may result is merely incidental to the lawful exercise of governmental functions. Therefore, the judgment of the court below should be affirmed.

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APPENDIX

(1) Federal Trade Commission Act, section 5 (38 Stat. 719; 15 U. S. C. A. Sec. 45)

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. *Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene* *and appear in said proceedings by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission.* If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. (Italics supplied.)

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

(2) Federal Trade Commission Act, section 6, subdivisions (f) and (g) (38 Stat. 721; 15 U. S. C. A. Sec. 46)

Sec. 6. That the commission shall also have power—

*   *   *   *   *

(f) *To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.*

(g) From time to time to classify corporations and *to make rules and regulations for the purpose of carrying out the provisions of this Act.* (Italics supplied.)

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